No. (1)

Supreme Court, U.S.
FILED
051613 JUN 19 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

BARBARA J. COMBS-BURGE,

Petitioner,

v.

DONALD H. RUMSFELD, Secretary of Defense,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Joseph D. Gebhardt
Counsel of Record
Charles W. Day, Jr.
GEBHARDT & ASSOCIATES, LLP
1101 17th Street, NW
Suite 807
Washington, DC 20036-4716
(202) 496-0400

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED

The Questions Presented are:

1) Whether an employer can rely on a performance evaluation alleged to be discriminatory to demonstrate that an employee's performance was unsatisfactory. (A conflict is arising on this issue).

2) Whether, in summary judgment proceedings, the Fourth Circuit shall be required to draw all legitimate inferences in favor of the non-moving party.

3) Whether in a discrimination case where the employer's conduct is challenged, the district court must consider whether the mixed-motive analysis applies.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Background 2

B. Proceedings Below 5

REASON FOR GRANTING THE WRIT 9

I. THE COURT MUST GRANT THIS PETITION TO ASSURE UNIFORMITY AMONG THE CIRCUITS AS TO WHAT EVIDENCE AN EMPLOYER CAN USE TO PROVIDE A LEGITMATE, NON-DISCRIMINATORY EXPLANATION FOR AN ADVERSE EMPLOYMENT ACTION 9

A. The Court must follow the signal of the D.C. Circuit which has shown its intent to disallow employers from using evidence an employee claims is tainted with discrimination to prove that the employee was not meeting legitimate expectations.....9

B. This evidentiary and policy conflict must be resolved so that the Fourth Circuit does not implicitly create a loophole within the *McDonnell-Douglas* framework to protect blatantly discriminatory employment actions.....10

II. THIS COURT MUST REINFORCE ITS RULING THAT IN SUMMARY JUDGMENT MOTIONS DEFERENCE IS GIVEN TO THE NONMOVING PARTY AS THE FOURTH CIRCUIT HAS OPENLY DEFIED THIS LONG STANDING PRECEDENT.....12

A. The Fourth Circuit erred in granting summary judgment to respondent because the evidence in favor of Ms. Combs-Burge revealed a material issue in dispute over the accuracy of the records proffered by respondent.....12

B. Blatantly ignoring the deference afforded to the nonmoving party, the Fourth Circuit also ignored Congressional policy aimed at providing discrimination claimants with their day in court by granting the right to a jury trial..... 15

III. THE FOURTH CIRCUIT ERRONEOUSLY FAILED TO CONSIDER WHETHER MS. COMBS-BURGE'S DISCRIMINATORY DEMOTION CLAIM COULD SUCCEED AS A "MIXED MOTIVES" CLAIM AND GRANTED SUMMARY JUDGMENT WHILE THERE WAS A DISPUTE AS TO WHETHER AN IMPERMISSIBLE FACTOR MOTIVATED THE EMPLOYMENT ACTION..... 16

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES:

American Fidelity & Casualty Co v. London & Edinburgh Ins. Co., 354 F.2d 214 (4th Cir. 1965) 13

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 13

Barbour v. Browner, 181 F.3d 1342 (D.C. Cir. 1999) 18

Combs-Burge v. Rumsfield, No. 05-1366, 2006 U.S. App. LEXIS 6871 (4th Cir. Mar. 20, 2006) 1, 8, 9

Davis v. Zahradick, 600 F.2d 458 (4th Cir. 1979) 12

Desert Palace, Inc., v. Costa, 539 U.S. 90 (2003) 16

Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310 (4th Cir. 2005) 10, 17

Love-Lane v. Martin, 355 F.3d 766 (4th Cir. 2004) 6

Mason v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) 13

Mastro v. Potomac Elec. Power Co.,
No. 03cv01865, 2006 U.S. App. LEXIS 12247
(D.C. Cir. May 19, 2006) 9, 11

McDonnell-Douglas Corp. v. Green,
411 U.S. 792 (1973) 5, 11, 15, 16

Reeves v. Sanderson,
530 U.S. 133 (2000) ..... *passim*

Ross v. Comm. Satellite Corp.,
759 F.2d 355 (4th Cir. 1985) 12, 16, 17

Williamsburg Wax Museum v. Historic Figures, Inc.,
810 F.2d 243 (D.C. Cir. 1987) 15

STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

42 U.S.C.S. § 2000e *et seq* ..... *passim*

42 U.S.C.S. § 1981a(c)(1) 15

42 U.S.C.S. § 2000e-2(m) 1, 16

42 U.S.C.S. § 2000e-16 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner Barbara J. Combs-Burge respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals appears at *Combs-Burge v. Rumsfeld*, No. 05-1366, 2006 U.S. App. LEXIS 6871 (4th Cir. Mar. 20, 2006).

JURISDICTION

The Court of Appeals entered judgment on March 20, 2006. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

(c) Jury trial. If a complaining party seeks compensatory or punitive damages under this section--
(1) any party may demand a trial by jury

42 U.S.C.S. § 1981a(c)(1)

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this *title [42 USCS § § 2000e* et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C.S. § 2000e-2(m)

STATEMENT OF THE CASE

Petitioner, Barbara J. Combs-Burge, brings this employment discrimination action against respondent, Secretary Donald M. Rumsfeld (in his official capacity), for violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e. In this case, Ms. Combs-Burge has declined to passively ignore respondent's brazen efforts to discriminate and to undermine a remarkable career built through three decades of loyal, dedicated service to defense agencies of the federal government. Nor has the Fourth Circuit chosen to be passive, as it has openly flouted the precedent set by this Court and its own, perpetuating a grave injustice to this worthy government employee.

A. Background

Barbara J. Combs-Burge is a 30-year federal government employee, who has worked for the past seven years for the Defense Logistics Agency's Defense Supply Center ("Agency") in Richmond, Virginia. (Combs-Burge Decl. ¶ 1). Before coming to the Agency, she served as a G-12 Acquisitions Logistics Manager for 10 years for the Department of the Navy. When she arrived at the Agency on July 6, 1999, Ms. Combs-Burge had a great deal of management experience and an excellent performance record. In recruiting Ms. Combs-Burge as a candidate for a G-12 Inventory Management position at the Agency, Janet Stuckey, Assistant Product Center 1 Leader, promised Ms. Combs-Burge, a Logistics Manager, that she would be given the needed technical and inventory management training. *Id.* ¶ 6. Assured her management experience and future training would allow her to excel in yet another government position, Ms. Combs-Burge transferred to the Agency and was assigned to lead Product Center 1's (PC-1) JASB section. She became the first and only African American Lead or Supervisory Inventory Management (IM) Specialist in PC-1

and was placed under the supervision of Robin Mapes, a white woman. *Id.* ¶ 8. Ms. Combs-Burge became responsible for supplying the needs of numerous military helicopters such as determining stock levels, processing requisitions, and deciding overall acquisition strategies. *Id.* ¶ 3.

While working under Mapes, the recruitment promise quickly evaporated. Mapes' noted bias towards African American women permeated the work environment, becoming more than evident to Ms. Combs-Burge and her staff. [1] For months, Ms. Combs-Burge was denied training on the Agency's computer system, the Standard Automated Material Management System (SAMMS), which is critical to her performance capacity. *Id.* ¶ 15-16. While consistently rebuffing Ms. Combs-Burge's requests for proper technical training, Mapes simultaneously managed to assign her to the most technically difficult helicopters, including the Black Hawk.[2] Additional and burdensome tasks were also required of Ms. Combs-Burge, in contrast to tasks given to her white IM counterparts. The white IMs were also given the benefit of repeated personal briefings and on-the-job trainings

---

[1] Ms. Combs-Burge learned that another African American woman had been denied the position offered to Ms. Combs-Burge and filed an EEO complaint against Mapes alleging racial discrimination. *Id.* ¶ 8. EEO staff Mary Stuart Weaver and Harold McManus provided declarations attesting to Mapes' racially biased comments and retaliation against African American complainants. (Weaver Decl; McManus Decl.). Ms. Combs-Burge's subordinates testified about Mapes' racial bias towards their supervisor. (Ellis Decl. ¶ 2-4); (Campos Decl. ¶ 6); (Stackhouse statement in EEO Counseling Report of 02/27/02). "Ms. Mapes often acts cold and abrasive toward African Americans," stated subordinate Karen Ellis. (Ellis Decl. ¶ 4).

[2] Supplying parts for the Blackhawk H-60 helicopters was referred to in the office as the "hot desk" because of their difficulty. *Id.* ¶ 11. In addition, she was responsible for the H-3 helicopters and held lead responsibility for the H-46, H-47, H-53, OH-58, and AH-64 helicopters. (Combs-Burge Decl. ¶ 9-12).

conducted by Mapes. (Campos Decl. ¶ 5). Excluded from these professional interactions, Ms. Combs-Burge was also left out of the annually required performance appraisals for two and a half years. (Combs-Burge Decl. ¶ 20). The JASB section, previously troubled before Ms. Combs-Burge's arrival, was now meeting and exceeding expectations under her supervision. JASB's overall supply availability increased from 68% (failing) to 85% (high) during Ms. Combs-Burge's tenure. *Id.* ¶ 21.

Nevertheless, on February 8, 2001, Mapes initiated a nine-month improvement period for Ms. Combs-Burge. This counseling period is supposedly designed for Mapes to *fully* evaluate Ms. Combs-Burge's performance and provide guidance for improvement. Yet, Mapes' Records of Counseling severely downplayed all of Ms. Combs-Burge's positive achievements. Any shortcoming (such as a typo) was gleefully documented, reiterated, and accompanied only by a vague recommendation. *Id.* ¶ 33. In March 2001, after a meeting with Mapes and other supervisors where Ms. Combs-Burge had complained of Mapes' race discrimination against a lower-ranking African American employee, Mapes told Ms. Combs-Burge that she planned to fire or demote her. *Id.* ¶ 37. While the "counseling" continued in a harsh and unconstructive manner, Ms. Combs-Burge was promoted in rank to Inventory Management Supervisor, indicating her performance was not substandard. *Id.* ¶ 21. Finally fed up with Mapes' criticism of her performance, on November 27, 2001, Ms. Combs-Burge complained to the Agency's Equal Employment Opportunity (EEO) Office about Mapes' harassment and denial of a required annual performance appraisal for two and a half years. *Id.* ¶ 40. Mapes then used the Records of Counseling as justification to give, finally, Ms. Combs-Burge a performance rating of "unacceptable" and to set her up for demotion from her G-12 supervisory level. Upon being temporarily reassigned from Mapes'

hostile watch to Major Martino's unit, Ms. Combs-Burge's performance returned to "fully successful," the highest level available in the Agency. (Stipulation Agmt.). Undeterred by Ms. Combs-Burge's current performance standing, Mapes continued action to remove her from a supervisory role and demote her from G-12 to G-11, a significant decrease in pay and reputation. Ms. Combs-Burge's demotion went through on June 3, 2002, despite a strong protest from Agency Deputy Director Sallee Justis, who emailed Colonel Pennington, the deciding official, saying:

> She is a 20 year government employee - with a good record, her section and PC [are] doing well, the only training she received is the DLA Supply Mgmt class, we PCS-d her for one job and changed the job after she got here, and she went a long time without a performance appraisal. Can you look yourself in the mirror and know she has been given a fair chance and that we are doing the right thing? (Email from Justis to Pennington of 12/05/01).

After two administrative complaints failed to achieve corrective action and Ms. Combs-Burge could no longer endure being demeaned and unfairly targeted, she filed suit in U.S. District Court for the Eastern District of Virginia.

B. Proceedings Below

Ms. Combs-Burge's suit charged respondent with a racially hostile work environment, demotion based on race, and retaliatory demotion in violation of Title VII of the Civil Rights Act 0f 1964. 42 U.S.C.A. § 2000e-16. In *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court set an evidentiary framework for employment discrimination

cases: (1) the employee must establish a *prima facie* case of discrimination; (2) the burden then shifts to the employer to produce evidence of a legitimate, non-discriminatory reason (burden of production, not persuasion); and (3) the employee then has the opportunity to prove the legitimate reason is pretextual.

To establish a *prima facie* case of discriminatory demotion, Ms. Combs-Burge is required to show: (1) she was a member of a protected class, (2) she was qualified for her job and her performance met legitimate expectations, (3) despite her qualifications she was removed from her job, and (4) after her removal her job remained open to similarly qualified applicants. *Love-Lane v. Martin*, 355 F.3d 766, 787 (4th Cir. 2004).

Ms. Combs-Burge presented evidence to the district court to meet all elements of her *prima facie* case. This evidence included that (1) Ms. Combs-Burge is an African American, (2) her white counterparts were treated much better by Mapes, (3) she was recruited for the JASB position at the Agency, and (4) her performance was objectively satisfactory even though she was not given performance standards for one year and denied an annual performance appraisal for two and a half years. Witness declarations attested to: (a) racially biased and retaliatory remarks made by Mapes; and (b) personal training sessions that Mapes routinely held with the other white lms but not with Ms. Combs-Burge. The district court also had evidence that, under Ms. Combs-Burge's management, her section improved and performed remarkably, as well as Ms. Combs-Burge individually. The court record revealed that Combs-Burge was a G-12 supervisor for 13 years and she consistently received excellent performance ratings both

before and after working under Mapes during her 30-year government career.[3]

In response, respondent proffered a legitimate, non-discriminatory reason by presenting Mapes' Records of Counseling. Respondent contended these Records showed Ms. Combs-Burge had not met legitimate expectations and that this was the sole reason for her demotion.

Ms. Combs-Burge, accompanied by sworn witness statements, disputed the accuracy of the Records and charged that they were a tool of harassment. She asserted the Records were a culmination of Mapes' racial animus that had created an environment of increased scrutiny, micro-management, deficient training, and demeaning criticism, not experienced by her similarly situated white counterparts. The district court had earlier denied Ms. Combs-Burge's motion for partial summary judgment, holding there were genuine issues of material fact in dispute (e.g., on her discriminatory demotion claim). In an unexpected turn, the same court later granted summary judgment to respondent, without any discovery or depositions in the ensuing three and a half month period. (*See* Order granting Def.'s Mot. for Summ. J.) In reviewing the district court's grant *de novo*, the Fourth Circuit discounted corroboration by a witness that the Records contained inaccuracies, by citing to the actual disputed

---

[3] At the Fourth Circuit oral argument, Judge Karen Williams commented on Ms. Combs-Burge's good ratings both before and after the Mapes' period.

Records as verification. [4] The Fourth Circuit also dismissed Ms. Combs-Burge's other witnesses, concluding that they could not provide relevant testimony because they were either her subordinates or in different positions. [5] *Combs-Burge v. Rumsfield*, No.05-1366, 2006 U.S. App. LEXIS 6871, at *14 (4th Cir. Mar. 20, 2006) [her inafter *Combs-Burge*, 2006 U.S. App.]. The Fourth Circuit agreed with the district court that even if Ms. Combs-Burge could prove a prima facie case, she "had not introduced sufficient evidence to satisfy her burden of demonstration that the DSCR's proffered legitimate reason for demoting her was false and pretext." *Id.* Having decided against all evidence in favor of Ms. Combs-Burge, the nonmoving party, the Fourth Circuit affirmed the grant of summary judgment to respondent.

---

[4] One statement made in the Records of Counseling that Ms. Combs-Burge asserted was "blatantly false" alleges she failed to hold bi-monthly staff meetings as required. Ms. Combs-Burge's denial of this was corroborated by staff member Aydia Campos, who stated Ms. Combs-Burge held "group meetings about three times per month and more if circumstances merited." (Campos Decl. ¶ 8.) This point was made in oral argument to the Fourth Circuit, but the court dismissed this statement, saying that the Records were silent on whether these meetings were for their intended purpose! *Combs-Burge*, 2006 U.S. App. at 6.

[5] Ms. Combs-Burge had five witnesses, as well as supportive testimony from at least three Agency witnesses.

REASONS FOR GRANTING THE WRIT

I. THE COURT MUST GRANT THIS PETITION TO ASSURE UNIFORMITY AMONG THE CIRCUITS AS TO WHAT EVIDENCE AN EMPLOYER CAN USE TO PROVIDE A LEGITIMATE, NON-DISCRIMINATORY EXPLANATION FOR AN ADVERSE EMPLOYMENT ACTION.

A. The Court must follow the signal of the D.C. Circuit which has shown its intent to disallow employers from using evidence an employee claims is tainted with discrimination to prove that the employee was not meeting legitimate expectations.

The Fourth Circuit noted that there "has been no suggestion that Mapes treated Combs-Burge more harshly than any other employee performing unacceptably." *Combs-Burge*, U.S. App. at *11. However, this misstates Ms. Combs-Burge's claim, which is that the "unacceptable" performance rating was based on discriminatory "counseling" records.[6] In *Mastro v. Potomac Elec. Power Co.*, No.03cv01865, 2006 U.S. App. LEXIS 12247 (D.C. Cir. May 19, 2006), the D.C. Circuit recently addressed the exact problems the Fourth Circuit's ruling below creates. [hereinafter *Mastro*, 2006 U.S. App.]. The *Mastro* court held that in a Title VII case "the conduct alleged by a plaintiff to be tainted by the employer's discrimination cannot serve as evidence that the employee was performing below the

[6] This is similar to *Reeves v. Sanderson*, 530 U.S. 133, 151-52 (2000), where respondent said that petitioner had been placed on probation because of an efficiency study done on his production line and not based on his age. However, the Court held that petitioner had produced evidence to rebut this explanation because the efficiency study had only been done on petitioner's line, even though his younger counterpart had the same rate of productivity.

employer's legitimate expectations." *Id.* at *22.[7] The D.C. Circuit has declined to reject legitimate discrimination claims just because a tainted answer can be articulated.

Similarly, respondent's proffered non-discriminatory explanation is entirely based on records purportedly showing Ms. Combs-Burge's failure to meet legitimate performance expectations. These records are tainted with discrimination as Ms. Combs-Burge challenged in her initial EEO complaint, maintaining that Mapes used these records solely as a tool of discriminatory harassment and to concoct a justification for demotion or removal. The D.C. Circuit in *Mastro* has recognized the inherent inequity in allowing discriminators to be insulated from liability just because they are in a supervisory role. The Court should not allow the Fourth Circuit to provide employers in powerful positions with an avenue to evade genuine discrimination claims.

B. This evidentiary and policy conflict must be resolved so that the Fourth Circuit does not implicitly create a loophole within the *McDonnell-Douglas* framework to protect blatantly discriminatory employment actions.

The Fourth Circuit has acknowledged that the "broad, overriding interest of Title VII of the Civil Rights Act of 1964, shared by employer, employee and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005). However, allowing an employer to use evidence that an employee alleges is tainted with discrimination to establish a legitimate explanation, creates

---

[7] The Mastro decision was authored by Judge Janice Rogers Brown and supported by Chief Judge Douglas Ginsberg and Judge Judith Rogers.

a noteworthy evidentiary loophole within the *McDonnell-Douglas* framework. *See Mastro*, 2006 U.S. App., at *22 ("Otherwise, any employer could routinely evade Title VII's protections by accusing an employee of misconduct, firing him, and claiming that the employee failed to demonstrate a *prima facie* case of discriminatory termination because his alleged misconduct constituted performance below legitimate expectations.").

This loophole is available to managers in positions of power who are already in the best position to discriminate and initiate cover-ups. Mapes provides the best example through her own pattern of behavior within the Agency. Experienced EEO Counselor Mary Stuart Weaver spoke with Mapes about Ms. Combs-Burge's complaints and an earlier complaint against Mapes by another African American female employee. Ms. Weaver was taken aback by Mapes' readiness to make retaliatory comments to an EEO representative.[8] Mapes was also careless about concealing her racial bias, making Ms. Weaver doubtful the conflict would have occurred had the other complainant been white. (Weaver Decl. at 1.) If this evidentiary conflict is not resolved, this is only one illustration of the inappropriate and unacceptable behavior that will not only be tolerated, but implicitly endorsed by the government's own agencies.

---

[8] EEO Supervisor Harold McManus submitted a statement saying that Ms. Weaver relayed to him and other individuals that Mapes had also made racially biased comments about the same employee. (McManus Decl. ¶ 1.)

II. THIS COURT MUST REINFORCE ITS RULING THAT IN SUMMARY JUDGMENT MOTIONS DEFERENCE IS GIVEN TO THE NONMOVING PARTY AS THE FOURTH CIRCUIT HAS OPENLY DEFIED THIS LONG STANDING PRECEDENT.

A. The Fourth Circuit erred in granting summary judgment to respondent because the evidence in favor of Ms. Combs-Burge revealed a material issue in dispute over the accuracy of the records proffered by respondent.

In affirming the district court's summary judgment order, the Fourth Circuit failed to follow the Supreme Court and even its own precedent. Both of these courts have consistently held that a party may not succeed in a summary judgment motion when there is a material issue of fact in dispute. In considering whether an issue exists, the evidence is to be looked at in the light most favorable to the nonmoving party. *See Reeves v. Sanderson*, 530 U.S. at 150 ("In passing upon whether there is sufficient evidence to submit an issue to the jury [the court] needs look only to the evidence and reasonable inferences which tend to support the case of the nonmoving party."). *See Ross v. Comm. Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985) ("Only where it is perfectly clear that there are no issues in the case is summary judgment proper, and even where a directed verdict would be proper after hearing the evidence, the district court should not try the case in advance by summary judgment.").

Material issues were placed in dispute because Ms. Combs-Burge and witnesses contradicted the Records of Counseling proffered by respondent. *See Davis v. Zahradick*, 600 F.2d 458 (4th Cir. 1979) (court reversed trial court's granting of summary judgment to defendant when plaintiff's complaint was contradicted by defense affidavits,

holding this required jury determination). *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986), gave instructions that "the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor." This includes "questions of credibility and of the weight to be accorded particular evidence." *Mason v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991). Ms. Campos' witness statement corroborated Ms. Combs-Burge's allegation that the Records contained false statements, all documented by Mapes. *See Reeves*, 530 U.S. at 147 ("The trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.").

Accepting the witnesses' testimony as true would require the jury, not the court, to make reasonable inferences as to whether the Records' inconsistencies showed that respondent's asserted explanation was not the real reason for demotion. The employee does not have to prove the employer's explanation to be pretextual through direct evidence, reasonable inferences can satisfy this burden. *See Id.* at 143 ("Although the presumption of discrimination drops out of the picture once the employer meets its burden of production, the trier of fact may still consider the evidence establishing the employee's *prima facie* case and inferences properly drawn therefrom ....on the issue of whether the employer's explanation is pretextual."). *See American Fidelity & Casualty Co. v. London & Edinburgh Ins. Co.*, 354 F.2d 214, 216 (4th Cir. 1965) ("Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences to be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn."). Thus, the Fourth Circuit ignored Ms. Combs-Burge's right to have the court draw all reasonable inferences in her favor. This is a

critical function in Title VII claims, which normally involve only circumstantial evidence.

The Fourth Circuit was not satisfied with simply eliminating the jury's ability to make reasonable inferences. The court also sought to remove the jury's function in weighing the evidence. By discrediting all of Ms. Combs-Burge's witnesses because they were not in a position to effectively evaluate her job performance, the court again trespassed into the jury's domain. *Reeves* has made it clear that "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." 530 U.S. at 150. These witness statements were not directed at proving Ms. Combs-Burge had met legitimate expectations, but provided specific, factual examples of Mapes' discriminatory practices.[9] Having worked under Ms. Combs-Burge and her white IM counterparts, these witnesses were able to closely observe the interactions between the white IMs and Mapes and between Ms. Combs-Burge and Mapes.[10] The relative weight to be given to these witnesses' ability to recognize Mapes' formal and informal behavioral distinctions is a decision to be made a jury. Again, the jury was entitled to determine if Mapes' discriminatory patterns created a reasonable inference that the legitimate explanation was merely pretext.

---

[9] This was made clear to the district court by Ms. Combs-Burge's counsel stating the witness statements were direct observations of events that happened and differences in treatment between Ms. Combs-Burge and her white counterparts.

[10] The Fourth Circuit dismissed a declaration from Audrey Berry, a fellow G-12 employee, who had worked closely with Ms. Combs-Burge on a long-standing project and stated that Ms. Combs-Burge performed well even though Berry knew she did not have training or performance standards. (Berry Decl. ¶ 1-6.)

This case should have been reserved for a jury's determination, and this is more compelling as disputed material issues were cited by the district court as the reason for denying Ms. Combs-Burge's motion for partial summary judgment. (*See* Order). In the three and a half month period between the decisions on Ms. Combs-Burge's summary judgment request and that of respondent's, the parties engaged in no depositions or discovery. Denying summary judgment based on material issues and then turning around to grant summary judgment for the opposing side has been deemed permissible by the D.C. Circuit, but only when based on an expanded record developed by key depositions. *Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243, 251 (D.C. Cir. 1987) (the expanded record included depositions that went to the very heart of the disputed issues). Here, the expanded record consisted only of declarations from supporting witnesses for both sides, which were not subject to cross-examination.

B. Blatantly ignoring the deference afforded to the nonmoving party, the Fourth Circuit also ignored Congressional policy aimed at providing discrimination claimants with their day in court by granting the right to a jury trial.

The *McDonnell-Douglas* framework was created in order to help plaintiffs' genuine, but hard-to-prove claims meet evidentiary standards as "there will seldom be testimony as to the employer's mental processes." *Reeves*, 530 U.S. at 141. With emphasis on circumstantial evidence, the key inquiry in an employment discrimination case will often hinge on credibility assessments of the plaintiff, defendant, and primary witnesses. Congress recognized this, and in the 1991 amendment to the Civil Rights Act, it set out to reduce the burden on discrimination claimants by making clear a preference for jury trials. 42 U.S.C.S. § 1981a(c)(1). Congress' unambiguous intent and policy

should not go unheeded by the courts. This creates even greater urgency to follow this Court's instruction and Fourth Circuit precedent. *See Ross*, 759 F.2d at 364 ("The nonmoving party is in a favorable posture, being entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf.").

III. THE FOURTH CIRCUIT ERRONEOUSLY FAILED TO CONSIDER WHETHER EMPLOYEE'S DISCRIMINATORY DEMOTION CLAIM COULD SUCCEED AS A "MIXED MOTIVE" CLAIM AND GRANTED SUMMARY JUDGMENT WHILE THERE WAS A DISPUTE AS TO WHETHER AN IMPERMISSIBLE FACTOR MOTIVATED THE EMPLOYMENT ACTION.

Congress and the courts have made it understood that the ultimate question in employment discrimination cases is whether intentional discrimination actually occurred. *See Reeves*, 530 U.S. at 153. Thus, under "mixed motive" even when an adverse action could have been taken in absence of an impermissible motivation, the employer still cannot escape liability if discrimination actually played a part in the decision. Congress specifically outlined "mixed motive" claims in the 1991 amendment stating that as an alternative to the *McDonnell-Douglas* framework, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C.S. § 2000e-2(m). *See also Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (plaintiff may prove a "mixed motive" claim through circumstantial evidence.).

The Fourth Circuit's rejection of Ms. Combs-Burge's discrimination claim conflicts with the "mixed motive" standard set out by Congress and the standards set in the circuit's precedent. It is immaterial that Ms. Combs-Burge did not include a "mixed motive" claim in her complaint. *See Diamond*, 416 F.3d at 318 (Whether a plaintiff pleads a mixed-motive claim is irrelevant because "a case need not be characterized or labeled at the outset....Similarly, the complaint itself need not contain more than the allegation that the adverse employment action was taken because of a protected characteristic."). *See Ross*, 759 F.2d at 364 (For summary judgment, the nonmoving party should be "given the benefit of all favorable legal theories invoked by the evidence.").

The Fourth Circuit based its decision on there being no genuine issue of material fact regarding whether the legitimate reason provided was false. Yet, under "mixed motive," Ms. Combs-Burge is not required to prove the falsity of the permissible reason given by respondent. *See Diamond*, 416 F.3d at 318 ("A plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision. Pursuant to the Civil Rights Act of 1991, the impermissible factor need not have been the sole factor."). Even accepting the Fourth Circuit's ruling, there is still a genuine issue of material fact of whether racial animus *motivated* the decision to demote Ms. Combs-Burge.[11]

It deserves added emphasis that employment discrimination claims are circumstantial in nature and the main role of the jury in these cases is to draw legitimate inferences. The Fourth Circuit in this case has gone against

---

[11] At the Fourth Circuit oral argument, Judge Diana Motz noted that Ms. Combs-Burge had proffered evidence of discrimination.

the policies initiated by this Court and Congress by creating a heavier burden for discrimination victims. In accordance with the proper role of the jury, the Fourth Circuit should not be allowed to decide its conclusions are superior to the function of the jury in drawing on real-life experiences to make reasonable inferences. As the D.C. Circuit has observed, "Title VII [does not] authorize federal judges to become super-jurors, weighing evidence and drawing independent conclusions regarding the ultimate question of discrimination." *Barbour v. Browner*, 181 F.3d 1342, 1354 (D.C. Cir. 1999) (Tatel, J., concurring and dissenting). Rather, actual jurors should be allowed to assess the strength of Ms. Combs-Burge's claims of racial indignity and others like hers, so that discrimination will not continue unabated. In this case, the courts below have critically failed to follow summary judgment law and have as a result perpetuated a grave injustice to a dedicated, long-term government employee working for our defense agencies. This Court should not allow these discriminatory actions to stand.

Respectfully submitted,

JOSEPH D. GEBHARDT
Counsel of Record
CHARLES W. DAY, JR.
GEBHARDT & ASSOCIATES, LLP
1101 17th Street, N.W.
Suite 807
Washington, DC 20036-4716
(202) 496-0400

June 19, 2006

Attorneys for Petitioner[12]

---

[12] Counsel for Petitioner was principally assisted on this Petition by Harvard Law student Heather N. Byrd.

APPENDIX

TABLE OF CONTENTS

Appendix Page

Order of
The Honorable Richard L. Williams
entered November 3, 2004 ..... 1a

Order of
The Honorable Richard L. Williams
entered February 17, 2005 ..... 2a

Per Curium Opinion of
The United States Court of Appeals for the
Fourth Circuit
Re: Affirming District Court's Grant of
Defendant's Summary Judgment
entered March 20, 2006 ..... 3a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

BARBARA J. COMBS-BURGE, Plaintiff,	
v.	Civil Action Number 3:04CV305
DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE, Defendant.	

[ENTERED November 3, 2004]

ORDER

This matter is before the Court on the plaintiff's motion for partial summary judgment. Finding that there are genuine issues of material fact, the Court DENIES the motion for partial summary judgement.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

November 3, 2004
DATE

Richard L. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

BARBARA J. COMBS-BURGE,	
Plaintiff,	
v.	Civil Action Number 3:04CV305
DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE,	
Defendant.	

[ENTERED: February 17, 2005]

ORDER

This matter is before the Court on the defendant's motion for summary judgment. For the reasons stated from the bench, the Court GRANTS the defendant's motion for summary judgment in its entirety. The Clerk is DIRECTED to TERMINATE any pending motions and close this matter.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

February 17, 2005
DATE

Richard L. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

BARBARA J. COMBS-BURGE, Plaintiff - Appellant, versus DONALD H. RUMSFELD, Secretary of Defense, Defendant - Appellee.

No. 05-1366

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2006 U.S. App. LEXIS 6871

January 31, 2006, Argued
March 20, 2006, Decided

NOTICE: RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CA-04-305-3).

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: Joseph Davis Gebhardt, GEBHARDT & ASSOCIATES, L.L.P., Washington, D.C., for Appellant.

Tara Louise Casey, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

ON BRIEF: Charles W. Day, Jr., GEBHARDT & ASSOCIATES, L.L.P., Washington, D.C., for Appellant.

Paul J. McNulty, United States Attorney, Alexandria, Virginia, for Appellee.

JUDGES: Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

OPINION: PER CURIAM:

Barbara Combs-Burge appeals the district court's grant of summary judgment to the Secretary of Defense (Secretary) on her claims of a racially hostile work environment, demotion based on her race, and retaliatory demotion at the Defense Logistics Agency's Defense Supply Center Richmond (DSCR) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-16 (West 2003). We agree with the district court that Combs-Burge cannot show that she was subject to a hostile work environment, and we also agree that she has not shown that the DSCR's legitimate, non-discriminatory and non-retaliatory reason for her demotion was false or a pretext for discrimination or retaliation. We therefore affirm.

I.

Combs-Burge, an African-American female, has been a federal employee for more than twenty years. From July 1999 until her demotion in June 2002, she was a Lead and Supervisory Inventory Management Specialist (IMS)[1] in DSCR's Product Center 1, which was responsible for maintaining the supply inventory for certain military helicopters.[2] She transferred to the DSCR from her job as an Acquisitions Logistics Manager for the Department of the

---

[1]Combs-Burge was initially hired as a Lead IMS, but in April 2001, the DSCR changed all Lead IMS positions to Supervisory IMS.

[2]The DSCR supports the U.S. military services by managing the supply of parts and materials for military aviation.

Navy in Philadelphia, Pennsylvania. Before and after her transfer, Combs-Burge was in the GS-12 pay grade. At the time of her transfer, she did not have experience as an inventory manager, but she alleges that the hiring official assured her that she would receive the necessary training.

As a Lead IMS, Combs-Burge was responsible for supervising twelve employees as well as performing inventory management tasks herself. To perform those tasks, she was required to use the Standard Automated Material Management System (SAMMS), a system with which she had no experience prior to her employment with the DSCR.

The crux of Combs-Burge's complaint is that she was subjected to a racially hostile work environment and was demoted because of discrimination on the basis of race and retaliation by her immediate supervisor, Robin Mapes. Combs-Burge alleges that Mapes's discriminatory conduct began from the moment they met, when Mapes appeared displeased that Combs-Burge had been hired.

According to Combs-Burge, Mapes harassed and discriminated against her in several ways. Combs-Burge contends that she never received training on the SAMMS system and that Mapes denied her request for the training. She also contends that she never received a performance appraisal during the first two-and-a-half years she worked at DSCR. She further alleges that Mapes treated Combs-Burge's white counterparts "much more favorably" and that Combs-Burge and her employees were subjected to heightened scrutiny and additional work assignments compared with other Lead and Supervisory IMS's. An employee under Combs-Burge's supervision stated that Mapes "unfairly and discriminatorily criticized, micromanaged, and harassed Ms. Combs-Burge." (J.A. at 54.) Another DSCR employee whose desk was near Mapes's

office stated that Mapes was warm and pleasant toward white employees but that Mapes "constantly nit-picked" Combs-Burge about the quality of her work. (J.A. at 105.) Combs-Burge also alleges that she was assigned additional work that other Lead IMS's were not required to perform. For example, the helicopters under her responsibility were particularly difficult and demanding systems, and Mapes required her to develop a "get-well plan" for these helicopters.

In March 2001, Combs-Burge complained to Mapes's supervisors that Mapes had discriminated against another African-American employee by giving a white employee a larger performance-based monetary award than the more experienced African-American employee. According to Combs-Burge, after she made this complaint, Mapes told her that she would be "removed from the government or at least demoted." (J.A. at 49.)

In November 2001, Combs-Burge complained to the DSCR Equal Employment Opportunity (EEO) office that she was being harassed. Less than a month later, Mapes issued Combs-Burge a notice of proposed demotion. On February 19, 2002, Combs-Burge filed a formal EEO complaint alleging harassment by Mapes. On June 3, 2002, Colonel Ross Pennington USMC, the director of business operations for DSCR, demoted Combs-Burge to a GS-11 pay grade.

On July 31, 2002, Combs-Burge filed a formal administrative complaint alleging, inter alia, that her

demotion was the result of discrimination.[3] On May 4, 2004, Combs-Burge filed this civil action in district court alleging a racially hostile work environment, race discrimination, and unlawful retaliation. [4] Combs-Burge moved for summary judgment, and the district court denied her motion on November 3, 2004, after concluding that "genuine issues of material fact" existed. (J.A. at 28.)

In response to Combs-Burge's allegations, the DSCR produced evidence showing that Combs-Burge was subjected to increased scrutiny and was eventually demoted because of her unacceptable job performance. This evidence included Records of Counseling that Combs-Burge had received monthly during a nine-month performance improvement period, in which the DSCR placed her to improve her job performance.[5] Each month, Combs-Burge's performance was reviewed to determine if it fulfilled certain critical elements, and each month her performance was found unacceptable. Although she generally does not dispute the accuracy of these records, Combs-Burge contends that the records "glossed over" the tasks she performed successfully and provided only "a terse

---

[3] Combs-Burge's complaint was a "mixed case" under *29 C.F.R. § 1614.302* because she could have appealed her demotion to the Merit Systems Protection Board. On April 15, 2003, the Defense Logistics Agency notified Combs-Burge that a final decision would be issued due to the mixed nature of her complaint. Shortly thereafter, she filed the instant civil action, and the Defense Logistics Agency then dismissed her complaint.

[4] Combs-Burge's complaint also alleged sex discrimination and a violation of the Equal Pay Act, *29 U.S.C.A. § 206(d) (West 1998)*. The parties agreed to a dismissal of Combs-Burge's sex discrimination and Equal Pay Act claims. (Appellant's Br. at 3 n.1.)

[5] The original performance improvement period was 180 days, but it was extended by ninety days because Combs-Burge's position changed from Lead IMS to Supervisory IMS.

recommendation" as to how she could improve her performance. [6] (J.A. at 47.)

The DSCR also explained that Combs-Burge's poor performance prevented her from receiving a required formal annual performance rating for year 2000 -- her first full year at the DSCR -- by its due date of February 15, 2001. [7] The annual performance rating analyzes the employee's performance for the preceding calendar year. Mapes could not give Combs-Burge a formal annual performance rating for 2000, however, because the DSCR regulations do not allow a supervisor to rate an employee as "unacceptable" without first giving the employee an opportunity to improve. Accordingly, when the time came for Combs-Burge's formal annual performance rating for her first full year at the DSCR, Lisa James, a DSCR employee relations specialist, advised Mapes that "the appropriate course of action was to begin counseling Ms. Combs-Burge on her performance and give her an opportunity to improve her performance." (J.A. at 350.) In fact, the first Record of Counseling, dated February 8, 2001, informed Combs-Burge

---

[6] In her brief, Combs-Burge asserts that the Records included a "blatantly false accusation" that she failed to hold regular team meetings. (Appellant's Br. at 21.) Her evidence of this "falsity" is an email she sent on September 21, 2001, to inform Mapes that a conference room was reserved for bi-weekly meetings. Nevertheless, the Record of Counseling for November 2001 indicates that Combs-Burge held only three regular meetings during the entire nine-month performance improvement period, rather than bi-monthly meetings as she was directed. Although an employee supervised by Combs-Burge stated that Combs-Burge held team meetings three times a month, there is no indication that these meetings were "for the purpose of clarifying policies, improving team performance, etc.," as instructed by the Record of Counseling, as opposed to meetings focused on the completion of a particular task. (J.A. at 254.)

[7] Although Combs-Burge acknowledges that an interim performance appraisal dated July 27, 2001, bears her signature, she alleges that the signature was affixed without her consent. Other than her assertions, she presented no evidence to support this allegation.

that her performance rating for year 2000 was being deferred until she completed the performance improvement period. On November 14, 2001, at the completion of her performance improvement period, Combs-Burge received a performance rating of unacceptable.

The DSCR also contradicted Combs-Burge's claim that she had not been provided the necessary training. In early 2000, she attended the DLA Supply Management Class, a class that includes instruction on the use of SAMMS. After her performance was found to be deficient, the first Record of Counseling informed her that she would be resent to the DLA Supply Management Class. Although she was scheduled for the class, she missed the first two days of the three-week class because she was sick. Against Mapes's instructions, Combs-Burge failed to attend the remainder of the class, a failure characterized in a Record of Counseling as "unacceptable and inexcusable." (J.A. at 272.)

Finally, the DSCR presented evidence that Combs-Burge's job performance remained unacceptable even after she was reassigned for ninety days to a new job with a different supervisor, who did not know of Combs-Burge's employment history. Nevertheless, she still failed to perform at the level expected for her grade, and about six weeks into her reassignment, her new supervisor approached Colonel Pennington with concerns about Combs-Burge's job performance. Combs-Burge's performance remained unsatisfactory in her new position, and she was demoted.

After presenting this evidence, the DSCR moved for summary judgment, which the district court granted on February 17, 2005.

II.

"Summary judgment is appropriate when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law." *Catawba Indian Tribe v. South Carolina, 978 F.2d 1334, 1339 (4th Cir. 1992)* (en banc); accord *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "The party moving for summary judgment has the burden of establishing that there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." *Catawba Indian Tribe, 978 F.2d at 1339.* This burden must be considered in light of the "substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. We review de novo the district court's grant of summary judgment. *Catawba Indian Tribe, 978 F.2d at 1339.*

1.

Combs-Burge first contends that summary judgment to the DSCR was improper because the district court had previously denied summary judgment to her after concluding that genuine issues of material fact existed. She argues that the record before the district court had not changed sufficiently to warrant an aboutface on the existence of issues of material fact. This argument misunderstands the nature of a denial of summary judgment. "When faced with cross-motions for summary judgment, the [district] court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar,* 316 F.3d 516, 523 (4th Cir. 2003)(internal quotation marks omitted). In denying summary judgment to Combs-Burge, the district court concluded that the evidence in her favor was weak enough that a reasonable jury could return a verdict for the DSCR; whereas in granting summary

judgment to the DSCR, the district court concluded that the evidence in Combs-Burge's favor was so weak that a reasonable jury could not return a verdict for her. See *Anderson*, 477 U.S. at 248 (stating that a genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). The district court's rulings, therefore, were not inconsistent but merely recognized the shift in perspective required to address each party's motions.

2.

To prevail on her claim of a racially hostile work environment, Combs-Burge must show that the harassment was (1) unwelcome, (2) based on race, (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive atmosphere, and (4) that there is some basis for imposing liability on the employer. *Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998). The harassment must be both objectively and subjectively severe or pervasive. *Harris v. Fork Lift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). The objective severity or pervasiveness of the harassment is judged from the perspective of a reasonable person in the plaintiff's position. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). The district court concluded that the conduct at issue here was not objectively severe or pervasive so as to create an abusive atmosphere. We agree.

The conduct that Combs-Burge alleges created a hostile work environment -- counseling her about performance deficiencies and assigning her remedial tasks to correct those deficiencies -- is not the type of conduct that is objectively abusive because it was the direct result of the documented shortcomings in Combs-Burge's job performance. In addition, Combs-Burge was responsible for difficult and demanding helicopters, and as a result she was

assigned additional tasks to support those helicopters. Nevertheless, assigning individuals remedial tasks to correct their job performance and assigning individuals to difficult jobs are not objectively abusive actions, particularly considering that we "do[] not sit as a kind of super-personnel department weighing the prudence of employment decisions made by [employers] charged with employment discrimination." *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998)(internal quotation marks omitted).

Similarly, although other individuals stated that Mapes "criticized, micro-managed," and "nit-picked" Combs-Burge about the quality of Combs-Burge's work, Combs-Burge has not shown that "but for" her race this "nit-picking" would not have occurred. *Causey, 162 F.3d at 802.* In other words, Combs-Burge has not shown that the alleged acts of mistreatment were based on her race rather than her poor job performance. There has been no suggestion that Mapes treated Combs-Burge more harshly than any other employee performing unacceptably. Finally, although Combs-Burge alleges that Mapes was more friendly to white employees than to her, general complaints of rude treatment are not sufficient to sustain a hostile work environment claim. See *Baqir v. Principi*, 434 F.3d 733, 747 (4th Cir. 2006) (stating that rude treatment by supervisors is "conduct falling short of that required to sustain a hostile work environment claim").

3.

To prove her claim that her demotion was the result of discrimination and retaliation, Combs-Burge relies on the burdenshifting method of proof established by *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny. See *Causey*, 162 F.3d at 800; *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir.

1989). Under the McDonnell Douglas framework, the employee has the initial burden of establishing a prima facie case of discrimination or retaliation. *411 U.S. at 802.* If she establishes a prima facie case, the burden then shifts to the employer to produce a legitimate, non-discriminatory and nonretaliatory reason for the adverse action against the employee. Id. If the employer articulates a legitimate, non-discriminatory or non-retaliatory reason, then the employee must show that the stated reason-was false and a pretext for discrimination or retaliation. *Id. at 804.* In some instances, an employee who has established a prima facie case can meet her ultimate burden of persuasion by proving that the employer's articulated reason is false. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). It is important to note that the burden that shifts to the employer is a burden of production, not persuasion. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). At all times the employee retains "the ultimate burden of persuading the court that she has been the victim of intentional discrimination [or retaliation]." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

A.

To establish a prima facie case of discriminatory demotion, Combs-Burge must show that (1) she is a member of a protected class, (2) she was qualified for her job and her performance was satisfactory, (3) despite her qualifications she was removed from her job, and (4) after her removal her job remained open to similarly qualified applicants. *Love-Lane v. Martin, 355 F.3d 766, 787 (4th Cir. 2004).* The district court concluded that even if Combs-Burge could establish a prima facie case, she could not demonstrate that the DSCR's proffered reason for her demotion was false. We agree.

The DSCR introduced written documentation that Combs-Burge's job performance did not meet the DSCR's legitimate expectations and that, as a result, the DSCR delayed her annual performance rating and placed her in a performance improvement period for nine months. Although Combs-Burge contends that she was performing satisfactorily, she does not support her assertion with relevant evidence. She did produce evidence that her team performed well, but this evidence does not refute the documented shortcomings of her individual performance, such as her failure timely to inform her subordinates of tasks and her failure to complete projects. Furthermore, although Combs-Burge submitted declarations from other individuals that she was performing satisfactorily, these individuals could not provide a useful appraisal of Combs-Burge's job performance because they were either Combs-Burge's subordinates or individuals in a completely different job, and there is no indication in the J.A. that these individuals were competent to assess whether Combs-Burge was meeting the DSCR's legitimate expectations.[8] We conclude that Combs-Burge has not introduced sufficient evidence to satisfy her burden of demonstration that the DSCR's proffered legitimate reason for demoting her was false and pretext. See *Love-Lane, 355 F.3d at 789.*

B.

To establish a prima facie case of retaliatory demotion, Combs-Burge must show that "(1) she engaged in [a] protected activity[,such as filing an EEO complaint]; (2) that [her employer] took adverse employment action against her; and (3) that a causal connection existed between the

---

[8]Combs-Burge presented one declaration from a Program Analyst at her grade level with whom she worked after her reassignment. This Program Analyst appraised Combs-Burge's work, however, based on a joint project they were assigned in May 2002. Accordingly, this appraisal is not probative of Combs-Burge's performance as a Lead and Supervisory IMS.

protected activity and the adverse action." *Williams*, 871 F.2d at 457. We assume that Combs-Burge can make out a prima facie case of retaliatory demotion.[9] Nevertheless, as we explained in addressing her discrimination claim, she has not demonstrated that the DSCR's stated nonretaliatory reason for her demotion -- her unacceptable performance -- was false and pretextual. This conclusion is buttressed by the fact that the evidence showed that the DSCR had counseled Combs-Burge on her unsatisfactory job performance and had placed her in a performance improvement period in February 2001 -- well before she complained about the treatment of her African-American coworker or filed her EEO complaint. See *Williams*, 871 F.2d at 454, 457 (concluding that an employee could not show that the employer's legitimate reason for the discharge was pretextual because the employer's reason developed before the employee engaged in protected activity).

III.

Because Combs-Burge does not allege conduct that was objectively severe or pervasive, she has not established a hostile work environment. In addition, she has not shown that the DSCR's reason for her demotion was false and pretext; thus, she cannot establish that her demotion was the product of discrimination or retaliation. We therefore affirm the district court's grant of summary judgment to the Secretary.

AFFIRMED

LEXSEE 2006 U.S. APP. LEXIS 6871

---

[9]Because the DSCR does not dispute that a federal employee such as Combs-Burge may pursue a retaliation claim under Title VII, we assume that such a right exists. See *Baqir v. Principi*, 434 F.3d 733, 748 n.16 (4th Cir. 2006).